EDITOR'S NOTE

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# SUPREME COURT OF THE UNITED STATES

## DELAWARE *v.* WILLIAM A. FENSTERER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

No. 85–214. Decided November 4, 1985

JUSTICE STEVENS, concurring in the judgment.

Summary reversal of a State Supreme Court's application of federal constitutional strictures to its own police and prosecutors in novel cases of this kind tends to stultify the orderly development of the law. Because I believe this Court should allow State Courts some latitude in the administration of their criminal law,[1] I voted to deny certiorari. Cf. *California* v. *Carney*, —— U. S. ——, —— (1985) (STEVENS, J., dissenting).

On the merits, I find the issue much closer to the question reserved in *California* v. *Green*, 399 U. S. 149, 168–170 (1970), than does the Court. The question reserved in *Green* concerned the admissibility of an earlier out-of-court statement by the witness Porter of which Porter disclaimed any present recollection at the time of trial.[2] The question decided by the Court today concerns the admissibility of an earlier out-of-court conclusion reached by a witness who disclaims any present recollection of the *basis* for that conclusion. The reasons for carefully reserving the question in *Green* persuade me that this case should not be decided with-

[1] In *California* v. *Green*, 399 U. S., at 171, the Chief Justice wrote separately "to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice." He correctly observed "that neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States." *Id.*, at 171–172.

[2] "Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture." 399 U. S., at 168–169. See also *id.*, at 169, n. 18.

out full argument. Nevertheless, because the Court has granted certiorari and decided to act summarily, because I am not persuaded that the Federal Constitution was violated, and because the State Supreme Court remains free to reinstate its judgment on the basis of its interpretation of State law, I reluctantly concur in the judgment.